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APPENDIX

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1969

No. 628

DANIEL JAY SCHACHT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1969
CERTIORARI GRANTED DECEMBER 15, 1969

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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[5] CLERK'S DOCKET ENTRIES OF CR. 67-H-239

1967

12-12 Indictment Filed.

1968

1-5 Arraignment: Plea of not guilty: (ABH)

1-29 Motion to consolidate CR-67-H-239 and CR-67-238, filed. (for trial)

1-30 Motion to quash indictment, filed.

1-31 Govt's response to Deft's Motion to Quash Indictment, filed.

2-1 Deft's Motion to Consolidate granted orally in open court; motion to quash indictment denied (JN).

2-12 Govt's requested jury instructions, filed.

2-15 Govt. subpoena to Don Benskin retd. & filed. Executed.

2-13 1st day of jury trial (JN) — Consolidated with CR-67-H-238 for trial.

2-14 2nd day of jury trial (JN).

2-15 3rd day of jury trial (JN). Order entered denying Deft's motion for instructed verdict. Verdict of guilty returned.

Order entered denying Govt's motion to increase bond of both Defts.

(In this case and in Cr-67-H-238). Order entered setting bonds of both defts. at \$500 (Surety).

[6] Presentence investigation ordered.

2-15 Motion of Deft. to instruct verdict, filed.

2-15 Govt's requested interrogatories to the jury panel, filed.

2-15 Jury verdict, filed.

2-26 Defts' requested questions to the jury panel, received and filed.

2-26 Defts' subpoenas to Dwight Harris & Harry Redman retd. & filed. Executed.

2-26 Govt. subpoena to Billy Lum retd. & filed. Executed.

2-29 Sentence: 6 mos. and \$250 fine. (JN). Oral motion by Deft. for a new trial. Any motions to be filed within 5 days.

2-29 Order to disburse cash bail bond, filed (JN).

3-1 Order admitting Defendant to bail in amount of \$2,000 and directing him to execute surety bond in this amount (JN).

3-1 Appearance bond filed (\$2,000 — Paul E. Ward, surety — cash bond).

3-4 Judgment and commitment filed (JN).

3-11 Govt's response to Defts' motion for new trial, filed (in CR-67-H-238 and CR-67-H-239).

3-14 Motion for new trial, filed (In CR-67-H-238 and CR-67-H-239).

[7] 4-12 Deft's notice of appeal, filed. (Cons. with CR-67-H-238).

4-12 Appearance of counsel on appeal, filed (in CR-67-H-238 consolidated).

4-18 Defts' motion to stay execution of sentence, filed.

4-18 Order granting stay of sentence provided amount of fines is deposited in registry, filed, (JN). (Consolidated with CR-67-H-238).

4-18 Designation of Record on Appeal, filed.

1968

2-15 Motion of Deft. to Instruct Verdict, filed.

2-15 Govt's Requested Interrogatories to the Jury Panel, filed.

2-15 Jury Verdict, filed.

2-26 Defts' Requested Questions to the Jury Panel, received and filed.

2-26 Defts' subpoenas to Dwight Harris & Harry Redman retd. & filed. Executed.

2-26 Govt. subpoena to Billy Lum retd. & filed. Executed.

2-29 SENTENCE: 6 mos. and \$250 fine. (JN). Oral motion by deft. for a new trial. Any motions to be filed within 5 days.

2-29 Order to Disburse Cash Bail Bond, filed (JN).

3-1 Order admitting defendant to bail in amount of \$2,000 and directing him to execute surety bond in this amount (JN).

3-1 Appearance Bond filed (2,000 — Paul E. Ward, surety — cash bond).

3-4 Judgment and Commitment filed (JN).

3-11 Govt's Response to Defts' Motion for New Trial, filed (in CR-67-H-238 and CR-67-H-239).

3-14 Motion for New Trial, filed (in CR-67-H-238 and CR-67-H-239).

4-12 Deft's Notice of Appeal, filed. (Cons. with CR-67-H-238).

4-12 Appearance of Counsel on Appeal, filed (in CR-67-H-238 Consolidated).

4-18 Defts' Motion to Stay Execution of Sentence, filed.

4-18 Order Granting Stay of Sentence provided amount of fines is deposited in Registry, filed (JN). (Consolidated with CR-67-H-238).

4-18 Designation of Record on Appeal, filed.

7-9 Certified, duplicated Record on Appeal mailed to Court of Appeals. (Copy of Record filed in CR-67-H-238).

1969

2-24 Appearance Bond Pending Appeal, filed \$2,000 —United Bonding Ins. Co., surety)—replacing cash bond filed on 3-1-68.

2-27 Order to Disburse Cash Bail Bond, filed (JN).

8-27 Original Exhibits returned from Court of Appeals.

8-27 MANDATE (or Judgment) of Ct. of Appeals rec'd & filed. ("AFFIRMED") (Filed in CR-67-H-238.)

8-28 (JN) Order that Defendant Surrender Himself to U.S. Marshal, filed and entered. (2 copies mailed to U. S. Marshal and 1 copy to Deft., his attorney, and his bondsman) — to surrender on 9-2-69, 8:30 A.M.

9-2 (JN) Hearing on deft's oral motion that order to surrender be stayed. Motion denied. Seagoville, Texas, recommended.

9-22 Commitment rtd. & filed. Exe. 9-11-69, FCI, Seagoville, Texas.

10-1 Telegram from Clerk, U.S.Ct. of Appeal granting Appellant's motion to recall and stay mandate pending determination of petition for writ of certiorari by Supreme Court, rec'd & filed.

10-1 (JN) Order that Deft SCHACHT be brought back to Houston for a hearing under Bail Reform Act, filed. (Copies of Order delivered to U. S. Atty and to Atty for Deft Schacht.)

10-2 (JN) Application & Order for Writ of Habeas Corpus Ad Prosequendum filed and entered. Writ issued.

10-2 Deft. DANIEL JAY SCHACHT'S Application for Bail Pending Appeal, filed.

10-3 Certified copy of Order of Fifth Circuit, dated 10-1-69, for Recall and Stay of Mandate pending final disposition of petition for Writ of Certiorari filed in Supreme Court, rec'd & filed.

10-6 Mandate returned to Court of Appeals pursuant to their order.

10-6 Deft's Motion for Setting and Hearing on Application for Bail, and Order granting same, setting hearing at 9:30 A.M. on 10-7-69 (JN), filed and entered.

10-7 (JN) Hearing on deft's application for bail, entered.

10-7 (JN) Order releasing deft. on bond by deposit of 10%, filed and entered.

10-7 Appearance Bond filed (10% deposited by Ezra L. Schacht).

10-8 Govt's Memorandum regarding admission to bail pending bail, filed.

10-9 (JN) Hearing on conditions of bail, entered. Govt. to prepare modified bond.

10-9 Writ of Habeas Corpus Ad Prosequendum ret'd. & filed. Exe. 10-5-69 by transferring deft. from FCI, Seagoville, to Houston.

10-16 (JN) Order imposing additional conditions of bail, filed and entered.

[78]

INDICTMENT OF SCHACHT

(Filed December 12, 1967)

(Caption Omitted)

The Grand Jury Charges:

On or about December 4, 1967, in the Houston Division of the Southern District of Texas, Daniel Jay Schacht, Defendant, willfully, knowingly, and without authority, and while not an officer or an enlisted man of the United States Army, did wear a distinctive part of the official uniform of the United States Army.

(Violation: Title 18, U. S. Code Section 702)

A TRUE BILL

/s/ ALAN L. DABNEY

Foreman of the Grand Jury

MORTON L. SUSMAN

United States Attorney

By /s/ JOEL P. KAY

Assistant United States Attorney

**[79] DEFENDANT SCHACHT'S MOTION
TO QUASH INDICTMENT**

(Filed January 30, 1968)

(Caption Omitted)

To The Honorable Judge Of Said Court:

Comes now, Daniel Jay Schacht, by and through his attorneys of record, Morris Bogdanow and Milton H. Mulitz and files and presents this his motion to quash the indictment against him heretofore brought in by the Grand Jury and as grounds therefore would show the following:

I.

That the statute under which he stands indicted to-wit: 18, Sec. 702, U.S.C.A., is one which violates the First Amendment to the U.S. Constitution since it forbids and interferes with freedom of speech.

II.

That the statute in question is further violative of the Fourteenth Amendment to the U.S. Constitution, which guarantees the equal protection of the law since it is in conflict with another statute with regard to the wearing of the uniform to-wit: 10, Sec. 771 to 774, U.S.C.A., which [80] permits the wearing of the uniform under certain occasions to-wit: By honorably discharged Army, Navy and Marine Corps officers, regular or volunteers, on ceremonial occasions, whereas discharged enlisted men can only wear the uniform for a period of three (3) months after their discharge while traveling from their place of discharge to home and prohibits the wearing of the uniform or any significant part thereof to civilians; which treatment of a different nature as between officers,

enlisted men and civilian personnel is wholly discriminatory and a denial of the equal protection of the law clause as guaranteed in the Fourteenth Amendment of the U.S. Constitution.

III.

Further that this statute in question conflicts with the other mentioned statute to-wit: 10, Sec. 772 (F) U.S.C.A., whereby the wearing of the uniform by anyone in any play house or theater or motion picture film while representing therein a military or naval character provided it does not tend to bring disgrace or reproach on the U. S. Army, Navy or Marine Corps; this sub-section permitting the wearing of the uniform, if used for dramatic portrayals and only if it does not tend to bring discredit or reproach on the U. S. Army, Navy or Marine Corps is [81] a distinct infringement on defendant's right or free speech as guaranteed by the First Amendment to the U. S. Constitution, since there is no determinative measuring rod as to what constitutes discrediting or reproaching of the U. S. Army, Navy or Marine Corps and this defendant would respectfully call to this Court's attention such dramatic portrayals as "*No Time For Sergeants*" — "*Sergeant Bilko*" — "*The Caine Mutiny*" — "*Dr. Strangelove*" — to mention just a few of the recent satirical famous portrayals of military individuals and military and naval procedures which have graced our film, television and theater in recent years. Are we to say that only big play producers, movie moguls or television networks may make fun of the U. S. Army or Navy, but an individual cannot portray "a soldier or sailor" unless what he attempts to say is popular with the self-appointed censor? Who says this is verboten, ala Hitler? Who gives the measuring rod that is to determine what is or is not disgraceful? Freedom of speech cannot be confined to

those causes or persons whose ideas we agree with, it must apply to all alike.

This statute in question by failing to set forth standards, which is to determine what is and what is not disgraceful and by what means this is [82] to be determined in a criminal statute is a discriminatory, capricious attempt by the U.S. Government to charge a person with a crime without setting out any definite standards or limitations to apprise the defendant of the full particulars of what the crime consists of, and such a statute has frequently been held by the courts of the United States to be wholly void and unenforceable on the grounds that it is vague, indefinite and uncertain. It is a fundamental rule of Anglo-American jurisprudence, that for a person to be charged as a defendant in a court of this land that he be fully apprised of the nature of the offense and all particulars thereof, in order that he may be able to fully prepare a defense or defenses thereto.

IV.

Further this statute in question is being used to charge this defendant with a crime, yet this crime fails to be clearly defined since the statute in question states that no one shall wear a "uniform or any significant part thereof." Who knows what is a "significant part of a uniform"? Does it mean that the major portion of the uniform must not be worn? Does it mean that the shoes must not be worn, the tie must not be worn, the cap must not be worn, the blouse must not be worn, or what combination [83] of any of these things need be worn by the defendant to constitute a crime? As stated above in the preceding paragraph, a criminal statute must, of necessity, state clearly, and definitely the person charged with a crime must be fully apprised of the nature of the offense which he is charged by the statute itself, and un-

less the statute definitely states that doing or committing a particular act and/or acts in a way definitely stated, the statute is vague for indefiniteness and uncertainty and must be held unconstitutional and unenforceable.

V.

The statute in question states no legislative purpose in its preamble and counsel for defense made a diligent effort to determine the exact legislative purpose and intent behind this legislation or the legislation which it replaced. As the statute is written, both the court and jury will have to engage in a magnitude of presumptions to enable them to determine what, if anything, was the legislative intent and purpose. Was this prohibition of the wearing of the uniform to prohibit the ease of movement by a spy in war time? If this is so, are we at war? When has Congress declared war? Who has the power to declare war? By all of the constitutional standards, the [84] United States is not at war at this time, and at the time of the alleged commission of the offense, for Congress has not officially declared war and the United States Constitution specifically states that "Congress alone shall declare war." Was the legislative intent to prohibit the wearing of uniforms by unauthorized personnel to prevent a person from using the uniform as a means of "bilking" the public out of potential donations to Army, Navy or Marine relief? There is no showing that this was or was not the intent of Congress. The only apparent intent of the legislation as written and as enforced seems to be to prevent freedom of speech on the part of the defendant or others like him from attempting to portray a military person in a "*street play*" and using this method as a protest against the draft and against our military actions in Vietnam. If this is the purpose, and if this is the way this law is to be applied, then this defendant has only one

conclusion to draw and one claim to make, namely that his rights of free speech have been infringed upon and that this statute is a direct violation and contravention of the First Amendment of the U. S. Constitution.

WHEREFORE, PREMISES CONSIDERED, defendant prays that his motion to quash the indictment [85] against him be granted.

Respectfully submitted,

/s/ MORRIS BOGDANOW
Morris Bogdanow

/s/ MILTON H. MULITZ
Milton H. Mulitz
Attorneys for Defendant
Suite 411 Melrose Bldg.
Houston, Texas
CA 2-9608

[100],

PROCEEDINGS

February 13, 1968

(Opening statements waived by all counsel.)

EDWARD G. STORK,

called as a witness in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Hartman:

Q. Your name, sir?

A. Edward G. Stork, S-t-o-r-k.

Q. Where do you live?

A. 6509 Stroud Drive, here in Houston.

Q. Your occupation?

A. Special agent for the Federal Bureau of Investigation.

Q. How long have you been so employed?

[101] A. Seventeen years.

Q. You are stationed where?

A. Houston, Texas.

Q. What are your duties?

A. To investigate violation of the laws of the United States.

Q. Do you know these two defendants in this courtroom?

A. Yes, sir, I do.

Q. How well do you know them?

A. I had occasion to view them on December 4, 1967.

Q. Here in Houston, Texas?

A. Yes, sir.

Q. Had you seen them before that time?

A. No, sir, I had not.

Q. Will you tell us where they were and about what time it was when you first saw them?

A. On December the 4th, in front of the Induction Station at 701 San Jacinto, about 6:30 in the morning. They were in front of the Induction Station, the old post office building, which is now called the United States Customs Building, I believe.

Q. How were they dressed?

A. Mr. Jarrett was dressed in a portion of the uniform of the United States Army as was Mr. Schacht.

[102] Q. Mr. Jarrett—

A. Smith.

Q. Tell us which one is Smith.

A. Mr. Smith is the one at the end of the table and Mr. Schacht is the gentleman closest.

Q. Which one did you notice first?

A. Mr. Smith.

Q. Tell us how he was dressed.

A. He had on a jacket of the current issue of the United States Army jacket, and was carrying in his hand a garrison hat.

Mr. Mulitz: I object to that answer of the current issue. He is not qualified to testify as to whether or not that particular jacket was a new issue or an old. It is purely a conclusion.

The Court: I sustain that.

Q. (By Mr. Hartman) Would you just describe the jacket he had on when you saw him?

A. A green jacket with the brass buttons of the type issued associated with military uniforms.

Mr. Mulitz: We object to that as purely a conclusion.

The Court: Sustain the latter [103] part of the objection and the motion to strike.

Q. (By Mr. Hartman) Let me ask you, did—

The Court: Let's don't compare. Just describe.

Q. (By Mr. Hartman) Did the blouse or jacket have buttons?

A. Yes, sir.

Q. Did they look like they were brass?

A. Yes, they looked like they were brass.

Q. Did the buttons have an insignia on them?

A. Yes, sir.

Q. Each button?

A. Yes, sir.

Q. Were you close enough to observe the buttons to tell us what it was?

A. The insignia was the spread eagle.

Q. Any other clothes?

A. Civilian pair of slacks.

Q. How about his hat?

A. It was of the same material as the jacket. The color was the same.

Mr. Multitz: If the court please—I hate to keep interrupting—but the indictment alleges a single [104] distinguishing part of a uniform. I think the Government is bound by the indictment of what they sought to prove. A distinctive part of a single uniform, and not the entire uniform.

The Court: Overruled.

Mr. Mulitz: Note our exception.

Q. (By Mr. Hartman) Did he have a hat on?

A. He had it in his hand.

Q. Describe the hat he had in his hand when you first saw him?

A. The hat was a flat green material.

Q. All right.

Did it have a chin strap?

A. No, sir, it didn't.

Q. Did it have any buttons or anything else on it?

A. No, sir.

Q. Any insignia on it?

A. No, sir, it didn't.

Q. How long, as a matter of time, did you observe that man there?

A. Just a short period of time.

Q. I see.

A. Ten, ten seconds.

Q. Let's go to the other defendant, Schacht.

[105] Did you observe the clothing he was wearing?

A. Yes, sir.

Q. Tell us your best recollection what he was wearing. Describe the clothing.

A. The clothing was green in color. It was a jacket, a pair of pants, and a cap of a khaki color. It had the chin strap hanging down, and there were brass-type buttons on the jacket.

* * *

[121] Q. Yes. What was he doing at the time you observed him in the demonstration at the induction center?

A. Parading back and forth at the induction center.

Q. Parading back and forth?

A. Yes, sir.

Q. How many were participating in the demonstration there at the induction center?

A. The exact number, I don't know, but there were several.

[122] Q. Several. Isn't it a fact, Mr. Stork, Mr. Schacht was putting on a theatrical satire or play in front of the induction center that morning?

A. I will have to give you an opinion.

Q. I'm not asking for an opinion. I'm asking whether or not he was putting into effect a theatrical satire or play in front of the induction center that morning?

A. He and several others were running around with water pistols and squirting everybody with colored fluid.

Q. All right. Wasn't there a person dressed in a familiar type of Asian hat and a black robe?

A. Yes, sir.

* * *

[130] Q. Let's refresh our memory, Mr. Stork, and go back to the morning of December 4.

You saw both Smith and Schacht together there, didn't you?

A. Yes, sir.

Q. One wearing that particular cap there, is it not so?

A. Yes, sir.

Q. And another person wearing that black robe and that straw hat which has been introduced into evidence?

A. Yes, sir.

Q. Isn't it a fact Mr. Schacht and this other person who you don't know—isn't it correct you don't know?

A. No, sir.

Q. —were portraying a theatrical act there in front of the induction center?

A. I would consider it a demonstration, not a play as I know a play.

Q. It could have been a play, could it not?

A. It would depend on your opinion.

[159] BILLY GENE LUM,

called as a witness in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kay:

Q. State your name.

A. Billy Gene Lum.

Q. Are you the same Mr. Billy Lum who was previously sworn in this courtroom this morning?

A. Yes, sir.

Q. Where do you live, Mr. Lum?

A. 8303 Winkler Drive.

Q. By whom are you employed?

A. Houston Police Department.

* * *

[162] Q. Was there anything unusual that occurred in or about the grounds of the Induction Center during the period of time you were there?

A. Yes, sir, there was.

Q. What?

A. Well, there was the defendant chasing another person with a water pistol filled with red ink.

* * *

[163] Q. (By Mr. Mulitz) I want you to look at Defendants' Exhibit Number 1 and Defendants' Exhibit Number 2.

I will ask you if you saw any person or persons wearing those two Exhibits when you were present there at the Induction Center?

A. Yes, sir, I did.

Q. Who was wearing that?

A. There was another person — I don't know his name — that was wearing the hat, and I believe this robe — there was a third person, if I am correct, that was wearing this.

Q. And Mr. Schacht was with those two persons, was he not?

A. Yes, sir.

Q. And they were play-acting? Mr. Schacht and those two persons were play-acting?

A. They were chasing each other. I don't know.

Q. In their hands was what?

A. A small water pistol filled with liquid I presumed to be ink.

* * *

[170]

J. EDMUND MCKEE,

called as a witness in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Day:

Q. State your name.

A. J. Edmund McKee.

Q. Are you the same J. Edmund McKee previously sworn in this courtroom this morning?

A. I am.

Q. Where do you reside?

A. Here in Houston, Texas. Do you want the specific address?

Q. No. By whom are you employed?

A. The United States Army.

Q. What is your rank?

A. Lieutenant Colonel.

Q. How long have you been in the United States Army?

A. Over twenty-five years.

Q. What is your present assignment?

A. I am Commanding Officer of the Armed Forces, [171] examining at the entrance station at Houston, Texas.

Q. Where is your office located?

A. 701 San Jacinto, Houston, Texas.

Q. Describe in general terms your duties in this assignment.

A. It is my responsibility for the operation of what is commonly called the Induction Center. We receive general applicants for the Army, Navy and Air Force and Marine Corps for process, and enlisting into the service.

Q. Were you in your office on December 4, 1967?

A. I was.

Q. Did you observe at that time any occurrence outside of your office?

A. I did.

Q. What did you observe?

A. I observed that morning a number of people, both male and female, in the area in front of the building, on the sidewalks and up to the steps passing out what appeared to be literature of some sort.

Mr. Mulitz: We object to what appeared to be. It could have been blank pieces of paper, your Honor.

The Court: The witness said what appeared to be literature. I will [172] overrule the objection.

The Witness: I was handed copies of these papers that were handed to persons entering the station, and I examined them and found them to be printed matters of some type. Some people carried placards. Some people were in costume — well, other than normal dress for the time.

Q. (By Mr. Kay) Do you know the Defendant Danny J. Schacht?

A. I do.

Q. Would you point him out here in the courtroom?

A. Yes, sir. He is the third man from the front, the one with the dark glasses, and his hand at his chin.

Q. Did you see this Defendant at the time in front of the Induction Center on December 4, 1967?

A. I did.

Q. How was this Defendant dressed?

A. He was dressed with part of the currently authorized army uniform.

Mr. Mulitz: We object to that. It is purely hearsay. It is a question for the jury to say whether it is a —

Mr. Kay: I will rephrase my [173] question, if your Honor please.

The Court: Very well.

Q. (By Mr. Kay) Colonel, just, in specific terms, starting with the man's head, what did he have on? Describe it in detail, not whether or not it is authorized or not.

A. On his head he had the fur felt Army officer's cap with the strap loose and hanging down, and with an army officer's insignia upside down.

On his body, this portion, he had an army green

shade 44 enlisted blouse with a U.S. Army Europe patch on the left shoulder.

Q. Was this blouse the same color as the blouse you now have on?

A. It was.

Q. I show you, sir, Government's Exhibit 7.

Does this appear to be the cap which Mr. Schacht had on?

A. It does.

Q. Is it the same color as the cap which Mr. Schacht had on?

A. It is.

Q. Now, sir, did you happen to see the buttons that was on the blouse?

A. I did.

[174] Q. And did they look in any way similar to the buttons you now have on your blouse?

A. They were exactly like the ones I have on my blouse.

Q. Will you describe specifically those buttons?

A. This is a metal button with the United States Army insignia with the eagle and so forth worn on much of our insignias, and they are identical of Army personnel.

Q. Would you state, please, whether or not you are authorized to wear that uniform in the courtroom today?

A. I am.

Q. Why is that?

A. Because I am on official duty.

Q. You are presently a member of the military?

A. That's correct.

Q. Could you have worn any other type of uniform today?

Mr. Mulitz: We object. We think it is immaterial and irrelevant. I think it has no bearing.

Mr. Kay: I will withdraw the question, your Honor.

Q. (By Mr. Kay) Do you know, sir, whether or not the uniform you now have on is a currently authorized uniform?

[175] A. It is.

Q. Is this the currently authorized color of the uniform?

A. It is.

Q. Was it currently authorized on December 4, 1967?

A. It was.

Q. And is it correct, or did you say previously, the color of the uniform you have on now is the same as the one that was worn by Mr. Schacht?

A. That's correct, it is.

Q. And the buttons were the same?

A. That's correct.

Q. Now, at the time you saw Mr. Schacht, did you recognize him as Mr. Schacht?

A. I did.

Q. Why did you recognize him?

A. I remember Mr. Schacht from having been in my Station in January of 1967, for induction processing, and I did recall him at the time. He was pointed out to me as being Mr. Schacht, and saw him on several occasions during the period of time he was there, and I recall him when seeing him again on December 4.

* * *

[176] Colonel McKee, are you familiar with the Army Regulations prescribing the authorized military uniform, particularly the Army?

A. Yes, I consider myself familiar.

Q. Were you familiar with those Army Regulations on December 4, 1967?

A. I was.

[177] Q. At the time you saw Mr. Schacht in front of the Induction Center, could you see whether or not the blouse being worn by Mr. Schacht was an authorized blouse to be worn by an enlisted man at that time?

A. The blouse I saw on Mr. Schacht was the Army Green Shade 44 blouse. It was then and is now authorized.

Q. What about the inverted eagle on the cap?

A. That is the current insignia worn.

Q. What about the buttons on the blouse?

A. They were the current authorized buttons.

* * *

[180] Q. Did you see any person or persons wearing any costumes out there?

A. I saw persons wearing clothing, one man with a cape and a flat cap.

Q. Is that what you want, sir?

A. Yes, sir.

Q. Colonel, let me show you this black robe and this hat.

A. Yes, sir.

Q. You had a good, clear sight, and observation, of what was going on out there?

A. Yes, sir.

Q. This is just a common, ordinary bamboo hat. Did you see any person wearing that that morning?

A. Yes, sir.

Q. Just a piece of cloth. When I open it up, sir, can you tell me what it is?

A. A cape of some kind, sir.

Q. Does it look like a choir robe, worn by members of a choir?

A. It could be. I don't know, sir.

Q. And, did you see a person wearing that out there that morning of December 4th?

A. Yes, sir.

Q. And, did you see any other type of costume that was being worn by any other person or persons out there?

A. As I stated before, I saw someone with a rather full cape and a black cap.

Q. What was that person doing?

A. Mingling around with the rest of them.

Q. Did you see Mr. Schacht and the person wearing that cape and cap there together?

A. Yes, sir.

Q. What were they doing?

A. Occasionally they were chasing each other around and apparently had a water pistol.

Q. Portraying an act?

A. Looked like a demonstration to me, sir. I don't [182] know whether it was an act or not, but it didn't appear to me to be.

[218] DENNIS G. PEREZ,

called as a witness in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kay:

Q. State your name.

A. Dennis G. Perez.

Q. Are you the same Mr. Perez who was in the courtroom yesterday and was sworn?

A. I am.

Q. What is your address?

A. 922 West Mariposa Drive, San Antonio.

Q. By whom are you employed?

A. Department of the Army, Fort Sam Houston, Texas.

Q. For how long?

A. Seventeen years.

Q. What is your position in your employment at Fort Sam Houston, Texas?

A. I am the Store Manager of the United States Army Clothing Store.

Q. How long have you worked in the Store there?

[219] A. Seventeen years.

Q. Would you state your position at the store, please?

A. I am in charge of operations of sales to Military Personnel. By that, I mean, reserves and retired personnel from the Armed Forces, reserve personnel on base status, inactive duty.

In general, military personnel of the Armed Forces with proper identification, as such.

Q. You say the people who buy from your store must present to you proper identification?

A. Yes, sir.

Q. To identify them as what?

A. Their rank and status.

Q. In other words, you can't sell to everyone.

A. No, sir.

Q. To whom can you sell to?

A. Any non-commissioned officer, any enlisted personnel, warrant officers and reserve personnel. Like I said, on pay status, weekly drill on pay status from the reserve program.

Q. Describe, in general, the type of merchandise you have.

A. Consisting of individual clothing—I mean, the military clothing, only, that is worn by the United States Army.

[220] Q. Where is this merchandise, in general, procured by you?

A. We order it directly from the Defense Supply Agency in Philadelphia.

Q. Would it be correct to say if they don't have it, you can't get it?

A. Right. If I don't have the issue item—without the issue item—they can't get it from me if I don't have it. But, they can go to a commercial source and purchase it. We have quite a few in San Antonio.

Q. All right. Mr. Perez, are you familiar with Army Regulation 670-5?

A. Yes, sir.

Q. Would you describe just, in general, what, to you, Army Regulation 670-5 prescribes, as you understand it?

A. I would consider that that—I mean, all my regulations of what the proper uniform of the United States Army is, both male and female, their insignias and apparatus, and how it is worn in general.

Q. In other words, you are familiar with the provisions of the Army regulations?

A. Right.

Q. Now, can you handle merchandise which are not within [221] the specifications of the types of apparel described in Army Regulation 670-5?

A. No, I can't.

Q. Were you familiar with the provisions of Army Regulation 670-5 on December 4, 1967?

A. Yes, sir.

Q. All right, sir. I would like to show you some photographs, and I would like for you, sir, to presume that the color of the blouse you see in these photographs is the same color as that pair of trousers.

Mr. Bogdanow: I am going to object to that. I don't know where he gets a presumption.

Mr. Kay: I have qualified this man as an expert, and I can give—

Mr. Bogdanow: I think the Government should prove this is a particular color that is army color, what shade, army shade, and army merchandise.

The Court: I will overrule the objection.

Q. (By Mr. Kay) Now, sir, I will show you Government's Exhibit Number 9, and assuming the color of the blouse to be that of the trousers, can you tell me [222] whether or not on December 4, 1967, that was an authorized United States Army blouse?

A. It was.

Q. And, I show you Government's Exhibit 5, a photograph, and ask you the same question.

Was that, assuming the color of the blouse to be the same as the trousers, an authorized Government Army blouse at that time, December 4, 1967?

A. Yes, sir, it is.

Q. Now, I will call your attention back to Government's Exhibit 9, and ask you to observe the buttons on that blouse.

Are those appropriate, authorized buttons to be worn on an Army uniform on December 4, 1967?

A. They are.

Q. I ask you to look at the emblem on the cap being worn, portrayed, depicted, in Exhibit 9, and ask you whether on December 4, 1967, it was an authorized emblem to be worn on an Army cap?

A. Yes, sir.

Q. Would it be an enlisted man or officer's, or both?

A. Officer's.

Q. Officer's only?

[223] A. Yes.

Q. Now, Mr. Perez, I show you Government's Exhibit 2.

Do you recognize the patch on the shoulder depicted in that picture?

A. Yes, sir.

Q. Will you describe it?

A. It is the European Command patch.

Q. Was it authorized to be worn on the uniforms on December 4, 1967?

A. Yes, sir.

Q. It was. Excuse me.

Mr. Perez, I show you Government's Exhibit Number 1, and assuming that the blouse in that picture is the same color as those trousers before you, is that an authorized Army blouse which was authorized to be worn on December 4, 1967?

A. Yes, sir.

Q. Can you tell from the photograph whether or not the buttons are also authorized?

A. The buttons are authorized with the exception it looks like the top button is unbuttoned or missing.

Q. All right. Thank you, sir.

Now, I show you, sir, Government's Exhibit Number 6, and ask you—excuse me—strike that.

[224] I will ask you, assuming the color of that blouse to be the color of the trousers before you, whether or not that was an authorized Army blouse on December 4, 1967?

A. Yes, sir.

[243] HARRY REDMAN,

called as a witness in behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bogdanow:

Q. State your name.

A. Harry Redman.

Q. What do you do?

A. I'm in the uniform business.

Q. Where is your place of business?

A. 1011 Main Street.

Q. How long have you been in this business?

A. Forty years.

Q. Is that military uniforms?

A. Yes, sir.

Q. Are they available for sale to the public?

A. Yes, sir.

Q. I mean, does a person have to prove he is a member of the armed forces to buy a uniform?

A. No, sir.

[264]

MICHAEL HUDGINS,

called as a witness in behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bogdanow:

Q. Would you state your name?

A. Michael Hudgins.

Q. What do you do?

A. Reporter for the Houston Post.

Q. On the date, December 4, 1967, as part of your assignment for the Post, did you see anything unusual happen at the Induction Station in Houston?

A. Yes, sir.

Q. What did you see?

A. I arrived there at 6:40 to cover a demonstration that broke up at approximately 8:30.

Q. What did you see at that place?

A. I counted nineteen people at the time I arrived who were in the demonstration. The first part I saw was the marching up and down with placards, anti-war placards.

[265] I arrived at 6:40, somewhere close to 7, and I saw the first of one of these skits take place where Mr. Schacht and another boy chased a third boy up and down the sidewalks.

Q. What was the nature of the skit?

A. Schacht had on a uniform with a cap. The second boy had on a—looked like coveralls of some type, maybe military-colored coveralls, and the third boy was dressed up as a Viet Cong, or supposedly, with the coolie hat and cape.

Q. You saw this more than once?

A. I counted three or four times.

Q. Did they say anything?

A. Yes. One would say, "Be an able American," and they would shoot the Viet Cong, and he would fall to the pavement, and they would walk up to the third person and kick the cape aside and say, "My God, this is a pregnant woman."

Q. That was repeated several times?

A. Maybe three times.

Q. As a newspaper reporter, you say this was a skit?

A. I couldn't qualify it. I interviewed as many people as I could.

Q. Did you characterize it as a skit?

A. What is your definition of the word skit?

[266] The Court: He just testified he was a part of the demonstration, sir, so characterized and reported.

Do you want to cross examine.

Q. (By Mr. Bogdanow). Did you see Mr. Schacht when you first arrived at the place?

A. At 6:40?

Q. Yes.

A. No, not until the skit began. I didn't notice him.

Q. When did you first notice him?

A. When the skit began the first time.

Q. When this shooting at this Viet Cong—

A. Yes, sir. There were shouts along with it, and that's when I noticed it.

Q. Anybody else in any sort of costume?

A. Yes, sir.

Q. What sort?

A. Only as I recall, now, there was one in a black cape with a sign, and he had some type of—some type of whiskers, and he looked rather Chinese, and I don't recall.

There wasn't any more military that I remember.

Q. These so-purported military personnel, were they in full Army uniform?

[267] A. This deal with Schacht and the other boy?

Q. Right, the defendants in this case.

A. The only thing I noticed—I am now aware of a full military uniform.

I noticed Schacht's uniform was open at the neck and the cap insignia was upside down.

Q. Was the cap on his head properly?

A. Not all the time.

Q. Did you notice him doing any saluting?

A. Yes, sir.

Q. How did he salute? Was it an accepted Army salute?

A. I don't know that.

* * *

By Mr. Bogdanow:

Q. Did you notice anybody with their face made up in any way?

A. Yes. There was a—I can't remember this [268]

distinctly, but it seems the person portraying the Viet Cong person was painted on the face and it looked like blood.

Q. You also said the man with the flowing cape had some kind of make-up?

A. I don't know whether it was something he had grown or not. It looked oriental.

* * *

[269]

Q. (By Mr. Kay) Mr. Hudgins, this running around and shooting the water pistol, you say this happened about three times?

A. Yes, sir.

Q. How long did it last?

[270] A. Two and half or three minutes.

Q. No longer?

A. No longer.

Q. Did I understand you correctly to say they ran over one another and the one with the cape and the Coolie cap was pushed down?

A. Would fall.

Q. And that was it?

A. Yes.

Mr. Kay: I pass the witness, your Honor.

EXAMINATION BY THE COURT

Q. What material was in the little gun, if anything, the water gun, so to say?

A. I didn't see any evidence of this. Maybe I wasn't that near it.

Q. You didn't see any instrument in the hand of Mr. Schacht?

A. I saw the water pistol only.

Q. You have testified about three people who were dressed in unusual clothes, one, Mr. Schacht, partly in uniform, and the other one with the so-called Coolie hat, which you characterized as a Viet Cong [271] woman, and the third person was the one in this picture, the one with the black hat on.

A. No.

Q. Am I wrong?

A. Yes. The boy identified himself to me — I interviewed him — as Bill Watson. I didn't see him in those pictures, I don't think.

Q. It seemed to me you referred to three people.

A. The three participating in the skit with Schacht. This boy who identified himself to me as a Bill Watson, and the person who played the Viet Cong woman.

These people were around and about, but they were not in the skit.

Q. You mean two around and about other than the three engaged in the skit?

A. That's right. They are holding the placards and what not.

* * *

[274] DOUGLAS BERNHARDT,

called as a witness in behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bogdanow:

Q. Will you state your name, please?

A. Douglas Bernhardt.

Q. What do you do?

A. Student at the University of Houston.

Q. How old are you, Doug?

A. Nineteen.

Q. Were you present at the — were you part of the performance in front of the San Jacinto induction station?

Mr. Hartman: This is the witness, and he is starting off leading him. We would like the Court to instruct counsel not to let him ask leading questions.

The Court: Sustained.

Q. (By Mr. Bogdanow) Were you present at the Main [275] Induction Station at San Jacinto and Rusk on the morning of December 4, 1967?

A. Yes, sir, I was.

Q. What, if anything, did you do there?

A. I was part of a performance that went on at the Induction Station. I portrayed a Viet Cong in our skit.

Q. A Viet Cong in this costume?

A. Yes, sir.

Q. Now, you wore this all through the time you were there?

A. Yes. Within a couple of minutes after I got there, I put on the robe and hat and had it on all during the skit.

Q. You say you had a performance.

Had you practiced this performance?

A. Yes. We did it once for the Humanists. That is a student group on the University of Houston Campus. We were showing it to see what they thought of it.

Q. When was this?

A. A couple of days prior, may have been one day.

Q. How many times did you rehearse this performance?

A. It was — we just more or less knew what we were going to do, and performed it once in front of the Humanists. There really wasn't much dialogue that [276] had to be rehearsed.

Q. You performed this outside on the sidewalk in front of the Induction Center?

A. Yes, sir.

Q. How many times did you do that?

A. Almost all the time it was there.

Q. What was the nature of this performance?

A. As I said, I was a Viet Cong. Danny Schacht — not virtually — Danny was a soldier with a couple of other people, and they chased me around and knocked me down and shot me with a water pistol.

See the red on here? It was supposed to be blood. It was a satire or something on the service, military action that someone takes in Vietnam.

Mr. Hartman: We object to this. He is getting off and starting to categorize again, particularly about the word satire.

We want him to tell us what the people said to him while he was on the ground.

The Court: I sustain that.

Whatever you think the performance was, tell the jury what you did.

[277] I am sustaining the objection to his question. In answering, simply just explain what you did, and you may explain what the red ink was intended to be from your standpoint.

The Witness: The red ink was intended to be blood. My part was to portray a Viet Cong getting shot up by

a serviceman. That is what I was there for and trying to show.

Q. (By Mr. Bogdanow) Were they chasing you around the block?

A. In front of the induction station. We ran all over, back and forth.

Q. And you did this continuously from 6 to 8:30?

A. Just about.

Q. How long would the so-called performance take place?

A. From one and half or two hours.

Q. I mean, how long did each individual skit take place?

A. More or less a continuous thing. I would be chased and kicked, and then we would take a breather for a couple of seconds, and continue on, pretty much a continuous thing.

Q. A repetition of the same type of performance?

[278] A. Pretty much so, with different comments being made.

Q. Who was this Bill Watson fellow?

A. I know Bill Watson.

Q. What was he doing?

A. He was another soldier, supposed to be.

Q. Where is Bill now?

A. I don't know.

Mr. Bogdanow: No further questions.

CROSS EXAMINATION

By Mr. Hartman:

Q. How old are you, sir?

A. Nineteen.

Q. University of Houston?

A. That's right.

Q. You rehearsed this part of your running around playing a Viet Cong, you say?

A. That's right, in front of the humanists, a rehearsal trying to get their opinion.

Q. How many times?

A. That one time.

Q. When was this?

A. It was on a Sunday, I remember that.

[279] Q. Can you give me the date, month and year?

A. December 3rd, 1967.

Q. I see.

A. Approximately 2 P.M.

Q. Who were some of the people that witnessed this rehearsal?

A. Mr. Harry Haskin.

Q. Who is he?

A. A neighbor, a member of the humanists.

Q. What is his address?

A. The same as Jarrett's.

Q. Who?

A. The same as Mr. Smith's. I don't know the number. I don't remember it. It is on Anita.

Q. He was a member of what?

A. The Humanists.

Q. Humanists?

A. That's right.

Q. Who else witnessed this?

A. I don't remember specific names offhand. There were approximately ten, fifteen people in there.

* * *

[282] Q. (By Mr. Hartman) Tell us the purpose of the demonstration.

A. The purpose of it, as I think I said before, was to try to show some of the actions which we felt wrong.

Q. We? You mean Mr. Smith, Mr. Schacht and you?

A. Danny and I, at least, and a couple of others that took part.

[283] Q. What was it you were trying to show was wrong?

A. Some of the more inhuman aspect American soldiers carry towards the Vietnam.

Q. What are those aspects?

A. As we portrayed them.

Q. I want to know what aspects you are talking about.

A. For instance, the torture of civilians, disrespect.

Q. You were trying to show the United States soldiers tortured civilians?

* * *

[293] Q. What you and Mr. Schacht were doing — was it your intention to reflect approval of the Army?

A. What we did was to show disapproval.

Q. Was your purpose to show credit to and approval of the Army?

A. Not in their action in Vietnam at the present time, no.

Q. Was it your purpose to discredit what the Army was doing as you understood it?

A. Yes. I mean, I don't know if it is an established policy, if we were criticizing an [294] established policy.

It was an action which I was going on.

Q. You believed those things were happening?

A. Yes.

Q. Was it your purpose to discredit the Armed Forces and, particularly, the Army in the eyes of the people that witnessed the demonstration?

A. The Army's action.

Q. Was it or not your purpose?

A. It was my purpose to discredit their actions. That was my purpose.

* * *

[316]

DANIEL J. SCHACHT,

called as a witness in his own behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bogdanow:

Q. State your name, please.

A. Daniel J. Schacht.

Q. How old are you, Dan?

A. Twenty-two.

Q. Where do you live?

A. 1620 West Main Street, Houston.

Q. Have you lived here all your life?

A. Right.

Q. You are the defendant in this lawsuit, one of the defendants in this lawsuit, and you are charged with having been wearing a significant part of the United States Army uniform.

Can you tell this court and jury what you were doing on December 4, 1967, in the morning?

A. We were completing our plans for a dramatic production.

Q. At 6:30 in the morning you arrived at the induction [317] station.

What did you do?

A. We put on the necessary equipment in order to costume ourselves for our action.

Q. Now, had this action or this play you would put on on the sidewalk, had this been rehearsed and discussed beforehand?

A. It had been given the necessary preparation. We had rehearsed it once, discussed the dialogue, sat down and written what we had considered to be the foundation for our play.

Q. You say you rehearsed one time. Where?

A. In front of the Humanists Association.

Q. At the University of Houston?

A. Right, University of Houston.

Q. Did you also publicize this intended skit to anybody else?

A. We did. We mentioned it, I believe, Thursday, the previous Thursday, at the Students For Democratic Society meeting at the University of Houston. It was brought up there for the purpose of discussion, the availability of people to participate in this action, and a number of people volunteered.

The Court: Are you talking about the demonstration or your personal [318] activity?

The witness: I am talking about personal activity on the previous Thursday.

Q. (By Mr. Bogdanow) The Judge means your personal activity or demonstration.

The Court: Were you seeking to get people to join in the demonstration or to join with you in your individual part?

The witness: In the particular production we were putting on, the play we were putting on.

In other words, we were asking for people to help us in that, for the procurement of the necessary equipment.

Q. (By Mr. Bogdanow) You knew about the demonstration coming off that day?

A. I knew there was a nationally coordination demonstration.

Q. And, as a part of that, you intended to put on this skit?

A. Yes.

Q. And you rehearsed it once before the Humanist Society?

[319] A. That's correct.

Q. And then you came along and played it on the sidewalk in front of the induction center?

A. That's correct.

Q. It has been testified here you were wearing a significant part of a uniform. You have seen the pictures here.

Were you wearing that?

A. I was.

Q. Were you in anywise properly dressed as a military man?

A. It's inconceivable.

Mr. Hartman: I don't believe he is qualified to answer that.

The Court: Sustained.

Q. (By Mr. Bogdanow) What were you wearing?

A. I was wearing, from the bottom up, a pair of civilian boots, green civilian pants, a belt with a silver buckle, regular shirt, dress green, rank insignia, United States Army removed, no lapels, and the obsolete hat, World War II hat. The insignia was upside down and one strap was dangling.

Q. And you and Jarrett Smith were wearing those uniforms?

A. I was wearing that uniform.

[320] Q. Have you seen the pictures that were shown as exhibits? Do these photographs represent you and Jarrett?

A. Yes, sir.

Q. Now, you have been to college, haven't you, Danny?

A. I have about a year at Rice University.

Q. Do you know what the word satirize means?

A. I do.

Q. Did you consider what you were doing a satire?

A. I did.

Q. Was the purpose to discredit the United States Army, or was the purpose to satirize the actions of the United States?

A. My purpose was to portray it realistically as a satire, but really I didn't realistically see any statement we did in the play would be founded on things I read in the past.

[330] Q. What was your purpose for doing this?

A. To make it clear exactly what was happening in the war in Vietnam in the form of a dramatic production, so those being inducted in the Army can clarify in their minds the actual activities in Vietnam which was killing people.

Q. Is this some of your dramatic production? Is this one of the photographic portrayals on the street in front of the induction center?

A. That is when I was in the wing.

Q. Does this portray you in portraying drama?

A. Portrays me standing there.

Q. Let's show you this one. You have the cap on lopsided, and the strap hanging down.

Is this the drama you were talking about?

A. That's not part of the drama.

* * *

[334] Q. (By Mr. Hartman) The drama you were trying to expose, was it to show your disapproval of the United States Army's involvement in Vietnam?

A. That's correct.

* * *

COURT'S CHARGE TO THE JURY

* * *

[396] Each indictment charges a violation as denounced in the law which is cited as 18 United States Code, Section 702, which reads as follows:

"Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, public health service or any auxiliary of such, shall be—" and then it goes on and provides the penalty, and the penalty is something with which [397] the jury is not concerned. If there be a finding of guilty, the matter is determined in Federal Court by the judge within the limits of the penalty set.

In the event of a finding of guilty on either or both of the indictments, I instruct you that in this Court the sentence to be imposed is the sole responsibility of the Court, as I have stated, I have given you the law, read it right out of the book, which the Defendants are each charged as having violated.

I will read the indictments. First, with respect to Mr. Schacht, "On or about December 4, 1967, in the Houston division of the Southern District of Texas, Daniel J. Schacht, Defendant, willfully, knowingly and without authority, and while not an officer or an enlisted man of the United States Army, did wear a distinctive part of the official uniform of the United States Army." In violation of Title 18, United States Code, Section 702.

Now, concerning Mr. Smith—it is a short indictment in each instance—this applies to Mr. Smith.

"On or about December 4, 1967, [398] in the Houston division of the Southern District of Texas, Jarrett

Vandon Smith, Jr., Defendant, willfully, knowingly and without authority and while not an officer or an enlisted man of the United States Army, did wear a distinctive part of the official uniform of the United States Army." That is in violation of the same statute which I have just read to you.

Now, in connection with this charge, I deem it necessary to give you the definition of certain terms which I have used and will use in the course of the charge, bearing in mind you have to relate these definitions to the language I have read to you.

And, within the terms used in the indictment is the word "knowingly." It is an act that is done knowingly when it is done with knowledge. It is to be distinguished from an act which is done by mistake, inadvertence or for other innocent reasons.

Now, the acts which are referred to which are alleged in the indictment to have been done knowingly is, of course, wearing of the uniform, a significant part of the uniform.

Now, second, willfully. It says [399] in the indictment this was done by the Defendants willfully, voluntarily or purposely with the specific intent to do that which the law forbids. That is, to say that either motive or bad purpose, to disobey or disregard the law.

In this connection you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate acts.

Now, in this regard, there doesn't have to be a knowledge or willfulness to violate the law. The willfulness and knowledge is knowing the act.

Now, if they knowingly and willfully did that act and

the act constitutes a violation of the law, that is the knowingly and willfulness that I refer to.

The distinctive part thereof refers to the uniform. Now, distinctive—the word distinctive has a meaning, and I can delve at some length in dealing with words, but here the words would not have to resort to the distinctive nature, because a distinctive part in this case of the uniform has a special meaning because it is contained in the regulations which you will [400] recall was introduced in evidence as Government's exhibit 12.

Under the law of this country, the Congress makes the laws in accordance with the Constitution and then it can authorize—for example, the President of the United States can do and act and then the President can, in turn, make certain regulations and delegate that authority to others.

In this case, the President has delegated the uniform of the armed service. Now, the President has the authority to delegate that responsibility to others, which he has done, and he has delegated the authority with respect to prescribing the uniform for the Army to the Secretary of Defense, and it is, in turn, carried out by the officials in that department, and it results in the regulations which have been introduced in evidence, "Uniform and insignia, male personnel of the Army."

Now, we go into that. Without undertaking to read all of it to you, it says "Purpose. This regulation prescribes the authorized material, design, ornamentation, insignia, accessories, manner, and occasion for the wearing [401] of the uniform by all male personnel of the United States Army. Only uniforms and items prescribed herein or as issued will be worn." And, meaning by the Army personnel.

And, for example, it says even Army personnel cannot

wear the Army uniform while engaged in off-duty work, and so forth.

Now, in that first chapter of the regulations designated 1-7, at page 1-2, it says "Distinctive uniforms and articles thereof."

These are the regulations delegated to the President and then, in turn, delegated down.

"The following uniforms and articles thereof for male members of the United States Army are distinctive. Distinctive components of the uniforms are limited to caps, coats, jackets and trousers except as indicated."

And, it goes on to say, one, the Army green uniform, and I am only referring to these things which would seem to apply to the evidence here.

The regulations will be given to you.

Item 14, buttons, uniform, [402] U.S. Army.

Number 17, insignia, and those are designated as distinctive parts of the Army uniform. They are distinctive under these regulations.

It goes on to say—to show the importance which the preservation of the uniform in its proper condition, and that it be worn only by proper people.

They go on to say "Individuals will assure that distinctive uniform items, upon becoming unserviceable for wear by those individuals, will be mutilated, dyed, or otherwise changed so that the items no longer possess the characteristics of distinctive United States Army uniforms."

Passing on in the regulation, Chapter 2 talks about responsibilities.

Chapter 3, the wearing of the uniform, and it refers to the wearing of the uniform by separated personnel.

Now, I'm getting a little bit to the question of authority, because if one is authorized to wear the uniform, then there can be no violation of this law.

As I read it, it said the [403] violation constituted wearing a distinctive part of the uniform without authority. That is very important.

It has one section that refers to separated people, people separated out of the service. I point this out to you because Mr. Smith was in the service and has been separated.

Under certain circumstances they would be authorized to wear the uniform. It would be up to you to determine whether either of the men were authorized under the circumstances.

It says separated people may wear the uniform upon the following occasions, military funerals, memorial services and inaugurals. Patriotic parades on national holidays, or other military parades or ceremonies in which any active or reserve United States military unit is taking part. And it limits the times that a person that has been separated from the service is authorized to wear the uniform to those times.

Now, it goes on to say when the wearing of the uniform is prohibited. "In connection with non-military activity of a business or a commercial nature.

"Under any circumstances which [404] would tend to bring discredit or reproach upon the uniform." Now, Chapter 7 covers the Army green uniform. There has been a great deal of testimony about Army green, and you remember the items testified to as being olive green.

Page 7-1, it gives you the material and the coat, and the shade of Army green, and goes on to describe the cap insignia as a part of the uniform, and you recall there is testimony here concerning the cap insignia which was referred to as being turned upside down and attached to an officer's cap.

If you want to compare what is described in these regulations as a distinctive part of the uniform, you will find the emblem, the cap insignia in a picture on page 9-7, which is marked and turned down here, which is an officer's cap with the insignia there, the seal of the United States, and it is described in here as being a distinctive part of the uniform.

This is what I am telling you what it is. I am not telling you this particular emblem on this cap is a distinctive part of the uniform. That is your determination. I am telling you how you can get aid in discharging your duty.

[405] Now, on page 14-2 it speaks of caps, service, officers. And, as I recall the testimony, this was an officer's service cap, not a current issue, I believe they said, and it says "all officers. The coat of arms of the United States 2 and 3/8 inches in height of gold-plated metal," and it refers to a figure in the back as being the insignia to be worn by officers, and the emblem, which is the emblem that goes on the front of the cap when it is properly worn.

On page 14-24 there is again a picture of the emblem. You will have that before you and can consult it to the extent you desire to.

Now, in mentioning a distinctive part of the uniform, it is not necessary to constitute a violation of this statute that the entire uniform be worn, as I have explained to

you, and as the statute states. A violation occurs if a distinctive part of the uniform is worn without authority.

Now, in this specific case the Government must prove beyond a reasonable doubt each of the following things with respect to each of the Defendants, to make out the offense charged as to each Defendant. That is the following:

[406] First, that the acts charged were done knowingly and willfully, as these terms have been described to you.

Second, that each, with respect to his own case—in the indictment it says the Defendants wore a distinctive part of the official uniform of the United States, and I have undertaken to explain to you how you can make your decision factually—these pieces of uniform and insignia put in evidence—whether or not they meet that standard, whether or not they are distinctive parts of the official uniform of the Army of the United States.

Third, the Government must prove to you beyond a reasonable doubt on the cases alleged in the indictment that each of the Defendants was not an officer or an enlisted man in the United States Army, and that each had no authority to wear a uniform of the United States Army.

And, I make no authority as being for the fourth item. There are four things that you look for.

Now, as I recall the testimony, Mr. Schacht said he had never been in the Army and [407] was not an officer nor an enlisted man.

As I further recall the record, it shows that Mr. Smith had been an enlisted man in the Army, but he had been separated.

You can make up your mind by way of examining the

documents whether or not these men, either of them, on the occasion in question, was an officer or an enlisted man of the United States.

Now, from the evidence, the facts before you, elements or items one, two and three, you will probably find easily enough, the evidence can quickly come to your mind, to enable you to make your decision as to whether or not the Government has discharged its burden.

The fourth is somewhat more difficult, and that is the Government has the duty to prove that these men weren't authorized to wear the uniform of the United States Army. That brings into play a different statute or a different law. They can be authorized by the regulations, and that would be a defense, if they were a separated person wearing the uniform at the ceremonial occasions specified in the regulations, and I don't recall that the occasion here was a funeral or any kind of [408] occasion that is listed here which would authorize it, but you can examine it.

The uniform, it says, may be worn at military funerals, inaugurations, patriotic parades on national holidays or other military parades or ceremonies in which any active or reserve United States military unit is taking part.

And, as I recall the testimony here, the occasion was not that kind of an occasion, but a demonstration or a protest, and not a part of that kind of activity. To determine whether it is or not, that is for you to determine, whether Mr. Smith, as a separated man, would be authorized under that provision, the section that each of the Defendants depends upon, and it says by which he was authorized—rather, Mr. Schacht depends upon, and says he was authorized, and that is Section 772 of Title 10 of the United States Code, which provides—the law is written into two parts.

One is where it describes the unauthorized wearing of the uniform is prohibited, or a distinctive part. That is another law.

But, immediately following where it says unauthorized, it says when wearing by persons not on active duty is authorized, and [409] that would be persons not on active duty, whether they have ever served or not in the armed forces.

"When wearing by persons not on active duty authorized."

It says "A member of the Army National Guard or the Air National Guard may wear the uniform prescribed," as the case may be.

And, it says a member of the Naval Militia may do so, and retired officers and so on, and we go down and there are some ten or twelve expressly authorized circumstances.

The one that is relied upon here by Defendant Schacht says this:

"While portraying a member of the Army, Navy, Air Force or Marine Corps, an actor in a theatrical or motion picture production may wear the uniform of that armed forces if the portrayal does not tend to discredit that armed force. Remember this, the portrayal doesn't tend to discredit that armed force.

What we are talking about here is the Army, not the Navy or the Health Service, but the Army. We have the Army uniform. I will read that again because it is very important. The defense has asserted and you have got to decide it [410] fairly and from your best judgment.

The wearing of the uniform or a distinctive part is

authorized "while portraying a member of the Army, Navy, Air Force or Marine Corps, an actor in a theatrical or motion picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force."

Now, because of the significance of some of the words used in there, even though they are ordinary English words, I am going to refresh your memory by Webster.

The word "portrayal" there, they are talking about a portrayal of the member of the armed force. Portrayal means to make a picture or image of; delineate; depict, or play the role or represent dramatically, or act.

Theatrical is of or relating to the theater or the presentation of plays, it says here.

They say they were authorized to wear the uniform. Mr. Schacht did because he says he was portraying a member of the Army in a theatrical production.

Now, in defining the word [411] theatrical, you have to think "what does that mean?"

Theatrical, according to Webster's dictionary means of or relating to the theater or the acting or presentation of plays marked by pretense or artificiality, having the qualities of a stage play or actors' performance.

This statute says more than it is for theatrical. It says theatrical or motion picture production.

If a person is wearing the uniform in a theatrical or a motion picture production—what does production mean? A literary or artistic work, a theatrical production. The staging and performing of a theatrical entertainment, an action resembling an elaborate theatrical performance, marked by extravagant display or exhibitionism, showy spectacular.

Now, I have given you the definitions of all the words, but coming down to the one here that you heard a great deal of in the testimony and which, if the wearing of the uniform were otherwise authorized, the authorization is terminated if the person who is claiming he is wearing the uniform under authority does so and acts in a manner to discredit the armed forces of [412] which the uniform is representative.

What does discredit mean? It means to deprive of credibility, to destroy confidence or trust in, to cause disbelief, to designate as inaccurate or unreliable, to deprive of good repute, to make less reputable or to disgrace.

That is Webster's definition of discredit.

Now, the law says if anyone who would otherwise be authorized to wear the uniform or a part thereof under this limited authorization in a theatrical performance, his authority is terminated if he does so in such manner to discredit the armed forces of which that uniform is representative.

Now, if you find from the evidence introduced by the Defendants that either or both of them wore the parts of the uniform in the pursuit of a theatrical or motion picture production, as I have attempted to define to you, and the wearing of the uniform didn't tend to discredit the armed services, then it would be your duty to acquit either or both of the Defendants who were so authorized.

If you find, on the other hand, [413] and believe the Government has proved each element of the case as I have given them to you, the four, beyond a reasonable doubt as to the Defendant, you will convict that Defendant and say by your verdict guilty.

I might add you may find one Defendant guilty and

the other not guilty. You will examine the evidence to each separately in the light of the law as I have given it to you.

You may find one guilty. That is up to you. If you have a reasonable doubt as to any one of the elements I have given you with respect to the Defendant having been proved, you will acquit the Defendant and say by your verdict not guilty, by having the foreman write it.

Generally consider each Defendant and the evidence with respect to that Defendant separately in your verdict as to that Defendant.

Now, under these instructions you may find one or both of the accused guilty or not guilty. At any time during your deliberations you may turn in your verdict of guilty or not guilty with respect to a particular Defendant.

[414] Now, in each indictment— just briefly—with respect to the evidence in the case as I recall it, in trying to review the evidence to you to some extent—I am telling you what my recollection is. Don't take my recollection. Take yours. Your recollection is the final and controlling one.

The indictment says the event occurred on or about December 4, 1967. Just to review with you how to go about analyzing—as I recall, there has been no question but there was an occurrence on December 4, 1967, down at the induction center on San Jacinto, when each of the Defendants was present from 6:30 in the morning to the 8:30 in the morning.

You have to determine with respect to each Defendant, whether what he did was done willfully and knowingly and without authority and while not an officer, and then you have to turn to the statute which is the defense of these people and think about it, whether or

not, first, they may have been authorized because it was a theatrical production or whether, even though it was a theatrical production, whether they were not authorized because their conduct was [415] such as to discredit the armed forces of which the uniform was a part.

Now, briefly, in the testimony you have the uniform. You can examine the uniform. You have the cap insignia. You take that with you and examine that. The photographs, you will have those, and you can look at them and that will refresh your memory as to what the record said occurred.

You have the testimony of the reporter who was offered by the Defendant, and you recall what he said about what he said occurred on the occasion.

You have the young man who was also there, his name, and who participated in the activities in which Mr. Schacht was engaged, whose name was Mr. Bernhardt, and he testified that the purpose in the activity there was to show what he thought, and Mr. Schacht said the same thing, what was going on in Vietnam, and to show the soldiers of this country were over there shooting civilians, and to do it dramatically by using red ink in a water gun. That was what was being enacted, and that was the purpose of the enactment.

The reporter stated he observed [416] the events as a part of the demonstration or protest, and reported it as such in the local press.

On the other hand, if you find that testimony and all other testimony in the case as against Mr. Schacht—he says he was there and he was putting on a play or theatrical production, theatrical performance.

The decision, ladies and gentlemen, is yours, as to the truth of the matter.

[418] counsel have the right to make objections to my charge, and I will hear them briefly before you go to the jury room.

(The following took place without the presence and hearing of the jury.)

Mr. Hartman: The Government has no objections, your Honor.

OPINION OF THE COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

(Caption Omitted)

*Appeal from the United States District Court for the
Southern District of Texas*

(May 14, 1969)

Before GOLDBERG and MORGAN, Circuit Judges,
and LIEB, District Judge.

LIEB, District Judge: On December 4, 1967, approximately twenty people gathered outside the Armed Forces Induction Center at Houston, Texas. Their purpose — not unexpectedly — was to protest American participation in the Vietnam conflict. They remained on the scene from about 6:30 A.M. to about 8:30 A.M. As such events will, this one attracted the [2] news media and federal and local law enforcement agents.

Among the demonstrators¹ were Daniel Jay Schacht and Jarrett Vander Smith, Jr., the appellants in this case. Schacht was observed wearing "the fur felt Army officer's cap with the strap loose and hanging down, and with

1. As we shall see, the word "demonstrator" has become a term of legal art, but for want of an adequate substitute it will be used in its generally accepted context, unless otherwise indicated.

an Army officer's insignia upside down. On his body . . . he had an Army green shade 44 enlisted blouse with a U. S. Army Europe patch on the left shoulder." The buttons on the blouse, as well as the blouse itself, were the currently authorized buttons and blouse issued to service personnel. The eagle insignia on the cap was also of current issue. Smith was seen wearing an Army jacket or blouse with official current military buttons attached to it.

Smith and Schacht were indicted, tried by a jury and convicted of violating 18 U.S.C.A. § 702 (1964)², which prohibits the unauthorized wearing of a distinctive part of an Army uniform. They made no attack on the jury finding that they did wear distinctive parts of the military uniform; they raised constitutional issues concerning the free speech guaranty of the First [3] Amendment and the due process guaranty of the Fifth Amendment of the United States Constitution.

By way of defending the case in the District Court, Smith and Schacht contended that they qualified to wear part of the uniform pursuant to 10 U.S.C.A. § 772(f) (1952),³ which permits an actor to wear a military uniform in a theatrical production "if the portrayal does not tend to discredit that armed force." It is argued on appeal

2. 18 U.S.C.A. §702 (1964):

Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to the distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than \$250 or imprisoned not more than six months, or both.

3. 10 U.S.C.A. §772(f) (1952):

While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.

that the appellants were participating in a play or skit which was designed to expose the evil of the American presence in Vietnam. They maintain that their actions were protected by 10 U.S.C.A. § 772(f) (1952) or, if not, that the statute creating an exception to the principal violation acts as an unconstitutional restraint on the right of free speech and is unconstitutionally vague.

The evidence indicates that the demonstration in Houston was part of a nationally coordinated movement which was to take place contemporaneously at several places throughout the country. The appellants and their colleagues prepared a script to be followed at the induction center and they actually rehearsed their roles at least once prior to the appointed day before a student organization called the Humanists."⁴

[4] Initially it should be stated that the evidence does not situate Smith as a participant in the so-called "skit." Apparently his only function was to distribut leaflets to the onlookers. That portion of this opinion which considers the Section 772(f) defense, therefore, is limited to appellant Schacht; as to Smith the defense is inapposite.

The skit was composed of three people. There was Schacht who was dressed in a uniform and cap. A second person was wearing "military colored" coveralls. The third person was outfitted in typical Viet Cong apparel.⁵ The first two men carried water pistols. One of them would yell, "Be an able American," and then they would shoot the Viet Cong with their pistols. The pistols expelled a red liquid which, when it struck the victim, created the

4. The record does not indicate whether this skit was enacted elsewhere by opponents of the Vietnam War at the other locations in the country where demonstrations were conducted on that day.

5. The identity of the person who wore the military overalls was not determined by the authorities. Another university student was dressed as the Viet Cong.

impression that he was bleeding. Once the victim fell down the other two would walk up to him and exclaim, "My God, this is a pregnant woman." Without noticeable variation this skit was reenacted several times during the morning of the demonstration. A demonstrator testified at trial that the purpose of their activities was not "to discredit the Army exactly, to discredit the actions of the United States being involved." Undoubtedly that statement fairly depicts the objectives of Smith and Schacht.

Smith and Schacht were not convicted for disturbing the peace or for disorderly conduct. They were not charged with 'sedition, treason, mutiny, or the like; nor [5] were they prosecuted for the substance of their utterances, either oral or written. Smith and Schacht were not prosecuted because of their roles in the performance of a skit which was critical of the American involvement in Vietnam.

Smith and Schacht were prosecuted for their unauthorized wearing of a distinctive part of the military uniform, plain and simple. Without more, their convictions would be unassailable from a constitutional viewpoint. They wore portions of the current issue of the military uniform; they did not have lawful permission to wear the uniform; and they acted with knowledge of what they were doing. For their violation of the statute they were tried and convicted by a jury.

The appellants, however, seek to cloak their action with the First Amendment guaranty against intrusions on their right of free and unhampered speech. How has the United States violated their right to free speech? Smith and Schacht argue that by regulating the wearing of armed forces uniforms, the United States has on this occasion restricted their constitutional right to peaceably demonstrate and speak on topics which are unpleasant

to the majority of citizens; that the statutory regulation acts as a previous restraint on their peaceful activities.

I.

The statute with which we are concerned, 18 U.S.C.A. § 702 (1964), proscribes certain *conduct*. It makes unlawful the wearing of a distinctive part of a military [6] uniform without permission.

It is assumed, and we think properly, that the appellants had a perfect right to demonstrate when and where they did. The demonstration was peaceable and orderly; it was not illegal as such. Accord, *Brown v. Louisiana*, 383, U.S. 131 (1966). The appellants sought to highlight alleged governmental evils and they were free to do so as an incident to their rights as citizens. In *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), the Court declared that:

Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.

See also, *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

Constitutional principles caution us to be circumspect when deciding controversies that include problems affecting freedom of speech. In weighing the possible evils to be derived at the hands of a strong federal government, our forefathers decided that the infringement of a man's speech was primary.⁶ And so, it has long been the policy of the courts to observe the rule enunciated recently in *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966):

⁶. Richards, *The Historical Rationale of the Speech-and-Press Clause of the First Amendment*, 21 U. Fla. L. Rev. 203 (1968).

- [7] When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.² [Footnote Omitted]

What we have said, however, should not be understood to mean that we are powerless to act when First Amendment defenses are hoisted. Constitutional rights are not the special possession of man isolated from society; the rights extend to all men, and their welfare also must be considered. Freedom of speech is not illimitable.

First Amendment rights "are not confined to verbal expression"; they include appropriate types of action. *Brown v. Louisiana, supra*, at 141-142; *Garner v. Louisiana*, 368 U.S. 157 (1961). At the same time, "certain forms of conduct mixed with speech may be regulated or prohibited." *Cox v. Louisiana*, 379 U.S. 536, 563 (1965). It becomes essential, therefore, for this Court to strike a constitutionally acceptable balance so that any statutory inhibition on the exercise of free speech will not fall within that vast wasteland of proscribed governmental activity.

The problem before us is not a novel one. The Supreme Court of the United States has contended with it on several occasions and, yet it remains unresolved. We start with what the Court said in *Cox v. Louisiana, supra*, at 555:

- [8] We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

Smith and Schacht were participating in two modes of conduct at the same time that they were voicing their disapproval of their sovereign's involvement in Vietnam. First, Smith was distributing leaflets and Schacht was acting out his role as a soldier in the skit. As to these activities the Government has no quarrel. Second, both men were wearing distinctive parts of the current issue of the military uniform. This conduct was forbidden by Congress and their doing of it resulted in their prosecution for violation of a criminal statute.

Can the United States Government lawfully enforce a criminal statute which may have as an incidental effect the inhibition of an individual's right of free expression? We think that it can under proper circumstances.

The most instructive case available is *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). The State of Missouri had a statute which made it a felony for any person to enter into an agreement in restraint of trade or competition. Giboney and other members and officers of a local union attempted to induce Empire [9] to refrain from selling its ice to certain retail ice peddlers who refused to join the local union. When Empire refused to join the boycott of the peddlers, the union commenced peaceful picketing of Empire's premises. In upholding the trial court, which had issued an injunction against the union to cease its picketing, the State Supreme Court found that the union was striving to compel Empire to enter with it into an agreement which would amount to a violation of a state criminal statute.

The labor union argued in the United States Supreme Court that it had a constitutional right under the First Amendment to picket Empire's premises in conjunction with the labor dispute. The Court, Mr. Justice Black writing, replied:

Aside from the element of disseminating information through peaceful picketers, . . . it is difficult to perceive how it could be thought that these constitutional guaranties afford labor union* members a peculiar immunity from laws against trade restraint combinations, unless, as appellants contend, labor unions are given special constitutional protection denied all other people.²

* * * *

It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of [10] a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases relied on by appellants calls for a different holding.

* * * *

. . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. [Emphasis Added; Footnote Omitted]

336 U.S. 496-502. The Court unanimously upheld the injunction against the union.

Most recently the Supreme Court has had occasion to address itself to a controversy which appears strikingly similar to our own. In *Tinker v. Des Moines Independent Community School District, No. 21* (U.S., February 24, 1969), the petitioners were suspended from school for knowingly violating a regulation which forbade wearing an armband at school as a form of protesting American involvement in Vietnam. The petitioners filed their complaint in the District Court seeking an injunction and nominal damages against the school officials. The lower court dismissed the complaint and the Court of Appeals

for the Eighth Circuit affirmed by an equally divided court.

[11] The Supreme Court reversed the dismissal of the complaint for the reason that the officials' action constituted a violation of petitioners' freedom of speech.

. . . The wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. . . . It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. (Slip Opinion, pp. 2-3)

A serious examination of *Tinker*, however, reveals that it does not dictate the outcome of the instant case. The touchstone in both cases is the nature of the restriction that was thwarted by the demonstrators. In *Tinker* the petitioners ignored a hastily-conceived regulation which had been promulgated by the school principals shortly before and in anticipation of the demonstration.

Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities. (Slip Opinion, p. 5)

The distinction should now be evident. We are asked to consider the exercise of First Amendment rights against the background of a federal criminal statute.

We do not think that the statute prohibiting unlawful wearing of a military uniform must fall when it affects [12] incidentally the exercise of free speech. We agree with the Court in *Giboney* when it stated that the Constitution does not extend "its immunity to speech or writing used as an integral part of conduct in violation

of valid criminal statute.”⁷

We cannot say that the unauthorized wearing of a military uniform is on the same plane as the wearing of an armband. It does not constitute a “symbolic act” akin to “pure speech.” The statute we are reviewing was narrowly drawn to prohibit certain conduct that infringes a substantial national interest in maintaining the dignity of the armed forces. Accord, *Cox v. Louisiana*, *supra*, at 564; contra, *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963). Nor can it wisely be argued that the statute is vague. It forbids one type of conduct. Its language is plain and notice of its proscription is evident. *Adderley v. Florida*, 385 U.S. 39, 42 (1966).

As the Supreme Court stated thirty years ago, in *Schneider v. State*, 308 U.S. 147, 161 (1939):

[13] Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

See also, *Cameron v. Johnson*, 390 U.S. 611, 617 (1968).

II.

Smith and Schacht next argue that 10 U.S.C.A.

7. Not even Smith and Schacht question the validity of the statute, except as it has been applied to them. We have been unable to find any cases which discuss the validity and legislative purpose of the statute, but there do exist cases which examine related statutes. With respect to Section 32 of the Criminal Code of March 6, 1909 (false impersonation of an officer of the United States), the Court in *United States v. Barnow*, 239 U.S. 74, 80 (1915), said, “It is the aim of the section . . . to maintain the general good repute and dignity of the service itself.” See also, *United States v. Lepowitch*, 318 U.S. 702 (1943); *United States v. Wight*, 176 F.2d 376 (2d Cir. 1949).

§772(f) (1952),⁸ an exception to the criminal statute discussed above, is unconstitutionally vague. They quarrel with the section which permits an actor in a "theatrical or motion picture production" to wear a military uniform unless his actions "tend to discredit that armed force." We do not consider such objection well-founded. The language of legislative grace is amply clear. Coupled with appropriate common-sense instructions by the judge, a jury would certainly be capable of reaching a rational decision concerning the appellants' activities.

III.

Following Appellant Smith's conviction and judgment of guilt the trial judge placed him on three years' probation with certain special conditions attached. In exchange for the privilege of probation Smith was required to "forego any association whatever with the Students for Democratic Society Organization," and to "Discontinue your association with [14] the members of the Humanists group with which you violated the law." Smith argues that these strictures violate his First Amendment rights of expression and assembly.

18 U.S.C.A. § 3651 (1964) authorizes the trial court to place a criminal defendant on probation "for such period and upon such terms and conditions as the court deems best." Congress obviously intended by means of the broad statutory language to invest the court with great discretion to establish conditions which would lead to the defendant's ultimate acceptance by society. *Barnhill v. United States*, 279 F.2d 105 (5th Cir. 1960), cert. denied, 364 U.S. 824 (1960). Smith could have rejected probation and elected prison. He chose to enjoy

8. See footnote #3.

the benefits of probation; he must also endure its restrictions. The trial court did not abuse its discretion in attaching the special conditions to Smith's probation.

AFFIRMED.

GOLDBERG, Circuit Judge, concurring specially:

Though concurring in the result my brothers have reached, I am impelled to uphold this conviction through a slightly different constitutional approach. I am less impressed by the distinction between speech and conduct than I am by the fact that the statute before us has a legitimate nonspeech objective.

I begin by noting that the statute under which the present conviction was obtained operates to preserve [15] the integrity of the military uniform by restricting its use to authorized persons. Whatever the object of such a restriction, whether to protect against the possibility of military impersonation, or simply to safeguard the need for a sure and expedient means of military identification, the restriction nonetheless has only the most remote and incidental effect upon free speech.

In order better to illustrate the remoteness of this impact on First Amendment rights, the present case is usefully compared to *O'Brien v. United States*, 1968, 391 U.S. 367, ____ S.Ct. ____; 20 L.Ed.2d 672. In *O'Brien* the Supreme Court held that a prohibition against the knowing mutilation or destruction of a draft card was not unconstitutional as applied to one who had burned the draft card in protest against the war in Vietnam. The Court based its decision in large measure on the fact that the government had a substantial nonspeech re-

lated interest in seeing that draft cards were not destroyed.¹

The government interest in seeing that uniforms are

1. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." 20 L.Ed.2d at 679-680.

* * *

"... the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing a harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

"The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California*, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB v. Fruit & Vegetable Packers Union*, 377 U.S. 58, 79 (concurring opinion) 12 L.Ed.2d 129, 142, 84 S.Ct. 1063 (1964).

"In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended §462(b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction." 20 L.Ed.2d at 683.

not worn by unauthorized persons is also nonspeech oriented. It is no more affected by the use of the uniform as a vehicle of protest than was the governmental interest in draft cards. In fact, it is reasonable to say that the statute before us has an even less inhibiting effect on free speech than the statute in [17] *O'Brien*. At least the statute before us enjoins only the *wearing* of a military uniform, not its destruction. As such its violation is complete when the uniform is donned. The subsequent use of the uniform for protest purposes is entirely irrelevant to the statute's real objectives. These objectives require that the patriot no less than the revolutionary, the bystander no less than the protester, forego the unauthorized wearing of the uniform. First Amendment rights do not suffer by the enforcement of such a statute.

Nothing in *Tinker v. Des Moines Independent Community School District*, 1969, 37 U.S.L.W. 4121, affects the constitutionality of the statute before us. In *Tinker* a school regulation banning the wearing of armbands to school was declared unconstitutional as an unreasonable restriction on free speech. While it seems plausible to say that the armband was no more or less a symbol of protest to its wearers than was the uniform in the case before us, the armbands, unlike the uniform and the draft cards, were not appendant to any valid governmental interest.

There was, to be sure, a valid governmental interest in *Tinker* that required the preservation of order and discipline within the school, and this the Court acknowledged. But this interest was no more derivative from or inherent in armbands than in purely verbal criticism of the Vietnam war. In short, armbands are "akin to pure speech," 37 U.S.L.W. at 4122, because they generate no governmental interest apart from the message they communicate.

[18] Uniforms and draft cards, on the other hand, are essential to purposes and perform secondary functions which have nothing to do with free speech. Since regulation of their use is not designed to also regulate attitudes toward them, *cf. Stromberg v. California*, 1931, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, their enforcement will not imperil First Amendment freedoms. I am convinced that the statute before us was not conceived in the suppression of freedom of expression. I must therefore conclude that its nullification cannot be justified because its violation was birthed in protest.

I would also affirm the judgment of the district court.

JUDGMENT OF THE COURT OF APPEALS**(Caption Omitted)**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

May 14, 1969

GOLDBERG, Circuit Judge, specially concurs.
Issued as Mandate;

ORDER GRANTING CERTIORARI

Daniel Jay SCHACHT, petitioner, v.

UNITED STATES, No. 628.

Facts and opinion, United States v. Smith, 414 F.2d 630.

Dec. 15, 1969. Motion for leave to file petition for writ of certiorari out of time granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted and case placed on the summary calendar.

THE CHIEF JUSTICE, Mr. Justice STEWART and Mr. Justice WHITE would deny motion for leave to file petition out of time.